FILE COPY

Office Supreme Court
FILED
SEP 30 193
CHARLES ELMORE CR
CL

No. 314.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,

v.

CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

REPLY BRIEF ON PETITION FOR CERTIORARI.

HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

E. A. HARDIN PRINT, INDIANAPOLIS, IND.

SUBJECT INDEX.

Page

I. The Circuit Court of Appeals was without power to pass upon the correctness of the verdict or the propriety of the action of the trial court in refusing to set it aside 1

II. Respondents' assertion that petitioner lacks any substantial or meritorious defense is contradicted by the record and by two prior jury verdicts in petitioner's favor 4

ALPHABETICAL TABLE OF CASES CITED.

Page

Cub Fork Coal Company v. Fairmount Glass Works, 33 Fed. (2d) 420 ..... 4, 5

Dingley v. Oler, 117 U. S. 490 5

Parsons v. Bedford, 3 Peters 433 2

Railroad Co. v. Fraloff, 100 U. S. 24 2

Smoot's Case, 15 Wall. 36 5

Wilson v. Everett, 139 U. S. 616 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,
v.
CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.
No. 314.

REPLY BRIEF ON PETITION FOR CERTIORARI.

I.

The Circuit Court of Appeals was without power to pass upon the correctness of the verdict or the propriety of the action of the trial court in refusing to set it aside.

To say, as counsel contend, that the facts were not found by the jury, because the jury "ignored the facts,"[1] is obviously only another way of saying that the jury committed an error of fact. Even if the

[1] Respondents' Brief, p. 2.

error consisted in finding too little damage, rather than in finding for plaintiffs-respondents instead of for defendant-petitioner, the correction of the error involves reexamination of the facts found. "The only modes known to the common law to reexamine such facts are the granting of a new trial by the court where the issue was tried, * * * or the award of a *venire facias de novo*, by an appellate court for some error of law which intervened in the proceedings."[2]

The common law rule and the Seventh Amendment make no exception of cases "where the undisputed and uncontradicted evidence showed large and substantial damages."[3] On the contrary, it was not competent for an appellate court of the United States "to reverse the judgment for any error in the verdict of the jury at the trial."[4] "If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below."[5] The authority of an appellate court "does not extend to a reexamination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties."[5] Any question as to the amount of the verdict could be

---

[2] Story, J., in *Parsons v. Bedford*, 3 Peters 433, 448.

[3] Respondent's Brief, pp. 2-3.

[4] Story, J., in *Parsons v. Bedford*, 3 Peters 433, 450.

[5] Harlan, J., in *Railroad Co. v. Fraloff*, 100 U. S. 24, 31.

"reached only through motion for a new trial,"[6] and the Circuit Court of Appeals could not "review any error committed in that respect by the jury, if there were one."[6] No more could it "take cognizance of the motion for a new trial, or that the verdict of the jury was contrary to law and not warranted by the testimon."[6]

The importance of the absolute discretion thus confided to the trial judge with reference to jury verdicts, is aptly illustrated by the instant case. It has been tried three times. Two previous verdicts *for petitioner* have been reversed. Even assuming (what we do not concede) that respondents, if entitled to recover at all, were entitled to substantial damage, the trial court doubtless concluded that by an overwhelming preponderance of the evidence, *respondents were not entitled to recover at all;* and reasonably assuming that a further trial would result in the same manner as the two preceding, decided that the ends of justice would best be served if the verdict, accepted by petitioner, were allowed to stand.

To assume, as have the Circuit Court of Appeals and Counsel for respondents, that the jury were "Daniels come to judgment" with respect to respondents' right to recover, but that both judge and jury violated their oaths with respect to the amount of damages, does violence to common sense.

---

[6] Blatchford, J., in *Wilson v. Everett*, 139 U. S. 616, 621.

For an appellate court to set aside a verdict upon such a palpably fallacious assumption was not merely to usurp but to pervert the function of the *trial* judge, a function equally as essential in the traditional administration of the institution of trial by jury as the function of the jury itself.

II.

Respondents' assertion that petitioner lacks any substantial or meritorious defense is contradicted by the record and by two prior jury verdicts in petitioner's favor.

The pleading and proof of material misrepresentation by respondents' alleged agent, as to its own ownership of the source of coal supply, was alone a substantial and meritorious defense which on the last appeal, on evidence which Judge Evans characterizes as "quite similar" (R. 153), the court expressly directed should be submitted to the jury. 33 Fed. (2d) 420, 423.

Respondents' contention that this misrepresentation was not an inducing cause of the contract "because petitioner had already determined to enter into the contract," is not supported by the record. The first misrepresentation had been made over one year before (R. 73, 75) and was renewed prior to signature to the present contract (R. 73, 75). Petitioner's President, Rau, testified positively that he would not have contracted had he known the truth (R. 73, 75), and that he relied on the representation. (R. 77.)

The above is sufficient to establish at least *one* meritorious defense which deprives respondents' argument under this head of any validity.

We believe it is irrelevant and impertinent at this time to discuss in detail other equally meritorious defenses. However, since respondents erroneously assert that the above is the only defense which we claim should have been submitted we wish to point out briefly, that there were others.

We contend that the evidence shows no breach and that the decision of the Circuit Court of Appeals to the contrary (33 Fed. (2d) 420) is in conflict with applicable decisions of this court, namely: *Smoot's Case*, 15 Wall. 36; *Dingley v. Oler*, 117 U. S. 490.

We contend also that good defenses existed under paragraphs II, III, and IV of the answer. In asserting, without arguing, the insufficiency of these defenses, counsel ignore the fact that the sufficiency of the defense under paragraph IV has never been adjudicated, and that as to the others the decisions of the Circuit Court of Appeals will not conclude this court, should it become germane to consider them. That some of these defenses possess merit in fact is abundantly established by two prior jury verdicts for petitioner.

However, the only question which can be properly presented on the present record is whether or not any error of law affected the last verdict. This issue, we believe, must be resolved in petitioner's favor.

It is therefore respectfully submitted that the writ of certiorari should be granted, the judgment of the Circuit Court of Appeals reversed, and the judgment of the District Court affirmed.

HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

FILE COPY

Office Supreme Court
FILED
NOV 7 1932
CHARLES ELMORE CR

No. 314.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,
v.
CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF.

HENRY H. HORNBROOK,
PAUL Y. DAVIS,
Attorneys for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

E. A. HARDIN PRINT, INDIANAPOLIS, INDIANA